SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20379

STATE OF CONNECTICUT

v.

JAVIER VALENTIN PORFIL

BRIEF OF THE DEFENDANT- APPELLANT
ON CERTIFICATION
WITH ATTACHED APPENDIX PARTS 1 AND 2

JAMES B. STREETO
SENIOR ASSISTANT PUBLIC DEFENDER
JURIS NUMBER 307285
OFFICE OF CHIEF PUBLIC DEFENDER
55 WEST MAIN STREET, SUITE 430
WATERBURY, CT 06702
TEL: (203) 574-0029 / FAX: (203) 574-0038
James.Streeto@jud.ct.gov

COUNSEL OF RECORD
AND
ARGUING ATTORNEY

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STATEMENT OF ISSUE

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OVERVIEW OF THE CASE

The defendant was convicted of Possession of Narcotics with Intent to Sell by a Non-Drug Dependent Person, C.G.S. § 21a-278(b); Sale of Narcotics within 1500 Feet of a School Zone, C.G.S. § 21a-278a(b); Possession of Drug Paraphernalia, C.G.S. § 21a-267(a), Illegal Possession of Narcotics, C.G.S. § 21a-279(a); and Interfering with an Officer, C.G.S. § 53a-167a.

Because the drugs the defendant was alleged to have possessed were not found on his person, the state depended on a theory of constructive possession. This Court has held consistently that to establish constructive possession, the government is required to present direct or circumstantial evidence to show some direct connection, or "nexus," individually linking the defendant to the contraband. *State v. Johnson*, 316 Conn. 45, 61–62 (2015); *State v. Chisholm*, 165 Conn. 83 (1973).

This case flouts that requirement. No nexus existed in this case. The drugs were found in the second floor landing of a stairway in a common portion of a multi-unit apartment building. The defendant did not live in or own the building where the drugs were found. The police witnesses reported seeing the defendant engage in two hand-to-hand transactions, similar to narcotics transactions; in each case, the defendant was seen to go into an open doorway, which accessed a stairway, which led to the second floor landing where the drugs were found. But the defendant was never seen on the landing, nor was he was seen with the drugs. And the police did not stop and search the other participants in the transactions.

Instead, five police officers moved in and attempted to arrest the defendant. But he managed to elude them, despite their superior numbers and surprise. He was only arrested some weeks later in a different location.

Frustrated, the police searched the building, finding the drugs on the second floor landing. But they were not tied to the defendant in any way: he did not live in or own the building, he was not seen with the drugs, and no statements, fingerprints, DNA or other physical evidence was introduced tying him to the drugs. The defendant made no incriminating statements. No

witness testified that he or she saw the defendant with the drugs on the landing or a bag similar to the bag containing the drugs. Nor did the police testify they questioned the other residents of the building about the ownership of the drugs. In short, there was no nexus: no evidence directly linking the defendant to the contraband.

In this case, the Appellate Court has moved from the requirement of a firm nexus between the contraband and the defendant. As such, it conflicts with the general principle that a nexus must be shown by sufficient evidence, and with the Appellate Court's decisions in *State v. Nova*, 161 Conn. App. 708 (2015) and *State v. Billie,* 123 Conn. App. 699 (2010). This opens the door to the terrible possibility that a defendant could be convicted based upon nothing more than temporal and spatial proximity—being in the wrong place at the wrong time. The Appellate Court erred in affirming the defendant's convictions.

NATURE OF THE PROCEEDINGS

The defendant, Javier Porfil, was charged with Possession of Narcotics with Intent to Sell by a Non-Drug Dependent Person, C.G.S. § 21a-278(b); Sale of Narcotics within 1500 Feet of a School Zone, C.G.S. § 21a-278a(b); Possession of Drug Paraphernalia, C.G.S. § 21a-267(a), Illegal Possession of Narcotics, C.G.S. § 21a-279(a); and Interfering with an Officer, C.G.S. § 53a-167a. The defendant's jury trial was held in the Judicial District of Waterbury before the Honorable Gerald Harmon. The trial began on October 11, 2016, and concluded on October 13, 2016. The jury convicted the defendant on all counts. 10/13/16T144. On January 20, 2017, at the defendant's sentencing hearing, the trial court entered unconditional discharges for the counts of Possession of Drug Paraphernalia, Illegal Possession of Narcotics, and Interfering with an Officer. The defendant received a total effective sentence of 20 years' incarceration, execution suspended after 10 years, followed by 5 years of probation for the remaining charges.

STATEMENT OF FACTS

On August 14, 2015, the Waterbury Police Department received an anonymous phone call at 5:35 p.m. stating that the defendant had a couple of warrants and was selling narcotics from the porch of 126-28 Walnut St. 10/11/16T21. No information was provided about the tipster's identification, why the tipster believed the suspect was the defendant, or how he or she knew the suspect was selling drugs and had warrants. 191 Conn. App. 498-99.

126-128 Walnut Street is a three-story multifamily house with an open front porch. The house has two front doors; the door on the left opens to a staircase leading to the second floor landing, and the door on the right opens to a first floor apartment. The house also has a back door that leads to the back door of the first floor apartment and a back staircase to the second floor. The defendant did not live at this address, but he was there often to visit family members; his wife's grandmother, aunt and cousin all live in the building. 191 Conn. App. 498-99; 10/13/16T22-23.

Officer Scott Phelan drove to that location in an undercover vehicle. 10/11/16T22. Phelan drove up Walnut Street, passing the house, then back down the opposite side of the street, passing it again. While driving, Officer Phelan observed a man on the porch, whom he identified as the defendant. 10/11/16T23. He parked 150-175 feet away, at the corner of Cossett and Walnut Street, and observed the porch using binoculars. 10/11/16T25, 35.

Officer Phelan stated that he could see a staircase through one of the doors of the house from this vantage point, but that it was "tough to see inside" despite his use of binoculars. 10/11/16T27.[1]

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[1] The Waterbury Police Department lost the photographs taken by the police on August 14, 2015. The state did not have any photographs to show jurors the view from Officer Phelan's perspective. 10/11/16T97. The jurors were only presented a Google Earth photograph taken on an unknown date, from a much closer angle. 10/11/16T98. Sergeant Agnon, who was not present at 126-28 Walnut St. on August 14, 2015, testified the photograph reflected how the house looked in August of 2015. 10/11/16T98.

Phelan testified that he observed the suspect have conversations with two different people at separate times, during which the suspect walked in and out of the house and then exchanged an item for an item. 10/11/16T29-30. The police did not get the identity of these people and did not stop or arrest them. Officer Phelan could not see what items, if any, were exchanged and he could not say that drugs were exchanged for money during these interactions. 191 Conn. App. 498-99; 10/11/16T37.

Phelan radioed the other officers. Officer Jerome Touponse and two other officers ran to the front porch, and two officers went to the back of the house to secure the rear door. Upon approaching the front of the house, Touponse and the other officers found the defendant on the porch. The defendant then turned around, ran through the open left front doorway, up the staircase, and entered the second floor apartment.[2] The officers gave chase. The officers eventually made their way inside the second floor apartment, where the occupants pointed the police to the back door of the apartment. Touponse went to the back door, but the defendant was nowhere to be seen. 191 Conn. App. 500.

Meanwhile, the two officers covering the back of the house positioned themselves on the back porch near the exterior rear door. After a short time, they observed the individual from the front porch begin to exit through the door, but, upon seeing the officers, he retreated into the house and shut the door. When the officers were eventually able to get through the door, they found the back door to the first floor apartment was open. The front door to the apartment was also open. 191 Conn. App. 500-01.

The police subsequently searched the entire house, but the defendant could not be located. In searching the house, however, they found a brown paper bag in the hallway going toward the third floor. The bag contained a digital scale, rubber bands, and 171 bags of

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[2] Officer Touponse testified that a person reaching the top of the stairway could take a 90 degree turn into the second floor apartment. "Then if you go even further to the right, its kind of a U-turn to come back. It goes to a stairwell to go to the third floor." 10/11/16T48. The drugs were found "in the hallway going towards the third floor," 10/11/16T52, past the point where the defendant turned and ran into the second floor apartment.

heroin, packaged in bundles of ten glassine packets. 191 Conn. App. 501; 10/11/16T34-35.

Officers spoke to multiple residents, from each floor of the house. 10/11/16T66-68. There was no testimony that they asked any of these individuals about the ownership of the drugs in the hallway. Neither the drugs nor the scale contained fingerprints or any other forensic or physical evidence connecting them to the defendant. 10/11/16T99. He was never seen with the bag and no one ever identified it as his property.

According to Phelan, when he arrested the defendant several months later, after Phelan explained to him that he was being arrested in connection with the events of August 14, 2015, the defendant stated that he was "sorry for running." Phelan also testified that the defendant was curious why he was being arrested. 191 Conn. App. 501; 10/11/16T34-35.

At trial, the defendant testified that he was not the man on the porch on August 14, 2015. Castille Morales and Carmen Cruz, residents of 126-28 Walnut Street, also testified for the defense. Castille Morales, the grandmother of the defendant's wife, testified that she was in the second floor apartment on August 14, 2015. She was familiar with the defendant but did not recognize the suspect who ran through her apartment. She could not see the suspect's face, but the suspect was taller than the defendant was. 10/12/16T24–27. Carmen Cruz, the defendant's aunt and first floor resident of 126-128 Walnut Street, also did not identify the suspect as the defendant, although she was also home that day. 10/13/16T13. The state did not ask either witness about drug trafficking or the drugs on the second floor landing. In addition, the defendant testified that he could not have physically executed the moves executed by the suspect, due to the condition of his back. 10/13/16T29. The defendant had been in a serious car accident in 2009. These injuries resulted in spinal surgery. The jury convicted the defendant of all charges.

ARGUMENT

I. THE APPELLATE COURT ERRED IN CONCLUDING THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTIONS FOR POSSESSION OF NARCOTICS AND POSSESSION OF NARCOTICS WITH INTENT TO SELL BY A PERSON WHO IS NOT DRUG DEPENDENT, WHEN THE EVIDENCE ESTABLISHED THAT THE DRUGS WERE FOUND IN A COMMON AREA OVER WHICH THE DEFENDANT DID NOT HAVE EXCLUSIVE POSSESSION.

This is a case about constructive possession. Since no drugs were found on the defendant's person, either on August 14, 2015, or when he was arrested, the state relied upon constructive possession to meet the possession element of the charged offenses.

But constructive possession of contraband found in the common area of a building to which multiple parties have access presents a difficult case for the state to prove. Mere spatial and temporal proximity is not enough. Rather, the state must show a nexus: other facts and circumstances directly connecting the defendant to the contraband.

There are no such facts and circumstances in this case. The state failed to establish constructive possession, and, in consequence, the evidence was insufficient to establish the defendant's possession of the narcotics. The defendant's convictions must be vacated.

A. Facts and Reviewability

1. Facts Relevant to This Claim. The relevant facts are set forth in the Statement of Facts.

2. The Defendant Properly Preserved this Claim by Moving for a Judgment of Acquittal. At trial, the defendant made motions for judgments of acquittal after close of the state's case and after completion of all the evidence. 10/12/16T20; 10/13/16T54, 62.

To the extent this claim was not properly preserved, the defendant respectfully requests review under *State v. Golding*, 213 Conn. 233, 239–40 (1989), *modified,* 317 Conn. 773, 781 (2015). The record is adequate for review. A claim that the evidence is insufficient to sustain the defendant's conviction is reviewable under *Golding* because it is of constitutional magnitude. *State v. Wright*, 273 Conn. 418, 431 (2005); see also *State v. Adams*, 225 Conn. 270, 275–76 n.3 (1995) ("any defendant found guilty on the basis of

insufficient evidence has been deprived of a constitutional right and would therefore meet the four prongs of *Golding.*"). The last two prongs of *Golding*, deprivation of a fair trial and harmful error, involve a consideration of the merits and are included in the analysis below.

B. Legal Standard

1. Supreme Court Review of Appellate Court Decisions. When reviewing an Appellate Court decision, this Court exercises de novo review. See *State v. Kendrick*, 314 Conn. 212, 222 n. 12 (2014).

2. Appellate Standard of Review. In reviewing the sufficiency of the evidence to support a criminal conviction the Appellate tribunal applies a two-part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." *State v. Williams*, 110 Conn. App. 778, 783 (2008). Although a jury may draw reasonable inferences from the evidence presented at trial, it must not engage in speculation. *See State v. Russell*, 101 Conn. App. 298, 315 (2007) ("[a]t some point, the link between the facts and the conclusion becomes so tenuous that we will call it speculation.").

3. Trial Court Standard. Under the U.S. Const. Amendments 5, 14, and Conn. Const. art. 1, § 8, defendants are guaranteed due process of law. The due process clauses require that all elements of a crime be proven beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 368 (1970). In this case, the defendant was sentenced to imprisonment for his convictions of Possession of Narcotics with Intent to Sell by a Non-Drug Dependent Person, C.G.S. § 21a-278(b), and Sale of Narcotics within 1500 Feet of a School Zone, C.G.S. § 21a-278a(b). Both of these offenses were based exclusively upon the drugs found on the second floor landing

at 126-28 Walnut Street. Possession is an element of both charges: both charges require the state to prove possession.[3]

There is no dispute, in the light most favorable to sustaining the verdict, that the bag found on the stairwell contained 171 individual bags of heroin, a narcotic substance. There is similarly no dispute that this quantity of drugs allows an inference, in the light most favorable, that the narcotics were intended for sale rather than personal use. Evidence was introduced, in the light most favorable, to establish that 126-28 Walnut Street was within 1500 feet of a school, and the defendant was not a student there. The only elements in dispute at trial were the identification of the defendant as the man on the porch, and possession of the narcotics. In the light most favorable, the Appellate Court could have found identification proven beyond a reasonable doubt, based upon the police testimony.

In order to prove that a defendant is guilty of possession of narcotics, "the state must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of a narcotic substance." *State v. Nova*, 161 Conn. App. 708, 718 (2015). "Possess," as defined in § 53a–3 (2), "means to have physical possession or otherwise to exercise dominion or control over tangible property...". "Dominion and control," as defined by the Supreme Court, follows the common usage of those terms; it "contemplates a continuing relationship between the controlling entity and the object being controlled," in this case, the contraband. *State v. Hill*, 201 Conn. 505, 516 (1986).

"To prove either actual or constructive possession of a narcotic substance, the state must establish beyond a reasonable doubt that the accused knew of the character of the drug and its presence, and exercised dominion and control over it." *State v. Billie*, 123 Conn. App. 690, 697 (2010). "Actual possession requires the defendant to have had direct physical contact with the narcotics." *Nova*, 161 Conn. App. 718. Actual possession "rests on legal title or direct physical contact as opposed to the legal fiction of constructive possession that can be

[3] Two of the remaining charges, Possession of Drug Paraphernalia, and Illegal Possession of Narcotics, require the state to prove possession as well.

inferred from the circumstances and can be the equivalent of actual possession." *State v. Williams*, 110 Conn. App. 787. Here, there was no evidence of actual possession.

"The difficult cases, such as the present one, arise when possession of an area, such as a car or home or an apartment, is shared with another person or persons." *State v. Williams*, 110 Conn. App. 787. This case, like *Williams*, is one of the "difficult cases."[4]

In such cases, the state must proceed on a theory of constructive possession. *State v. Billie*, 123 Conn. App. 697. To establish constructive possession, the state must provide the jury with evidence establishing, beyond a reasonable doubt, that the defendant was (1) aware of the narcotics' presence and (2) exercised dominion and control over them. *See State v. Williams*, 169 Conn. 322, 335 (1975). Knowledge "of the presence of an object is generally a prerequisite to the exercise of dominion and control." *Handy v. State*, 930 A.2d 1111, 1126 (Md. Ct. Spec. App. 2007).

To establish constructive possession, the state must present evidence establishing more than just spatial and temporal proximity, the defendant's mere presence at the location where the drugs were located. "[T]he presence of the defendant near the contraband without more is insufficient to support an inference of possession." *State v. Brunori*, 22 Conn. App. 431, 436 (1990). Rather, constructive possession of a narcotic requires a showing that the defendant had **an appreciable ability to guide the destiny of the drug.** *State v. Johnson*, 316 Conn. 45, 62 (2015) (emphasis supplied).[5]

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[4] In a tacit nod to the difficulty, Judge Tamm of the D.C. Circuit noted, "[t]he more cases one reads on constructive possession the deeper is he plunged into a thicket of subjectivity." *United States v. Holland*, 445 F.2d 701, 703 (D.C. Cir. 1971) (Tamm, J., Concurring). Nevertheless, some patterns do emerge, as detailed below.

[5] The *Johnson* Court adopted this elegant definition from *United States v. McKissick,* 204 F.3d 1282 (10th Cir. 2000). Several circuits and at least three state appellate tribunals have cited the definition. It appears to have originated in *United States v. Staten*, 581 F.2d 878, 884–85 (D.C. Cir. 1978). In *Staten*, the defendant was not in exclusive possession of the premises upon which the drugs are found. The *Staten* Court held that "[m]ere presence of the accused on the premises, or simply his proximity to the drug, does not itself enable such a deduction."

There are no "dispositive factors" which will always establish constructive possession. Constructive possession is extraordinarily fact sensitive. But what constructive possession cases do always require is a nexus between the defendant and the contraband. To establish constructive possession, the state is required to present direct or circumstantial evidence to show "some connection or nexus **individually linking** the defendant **to the contraband."** *State v. Johnson*, 316 Conn. 61–62 (cites and quotes omitted, emphasis supplied); *State v. Chisholm*, 165 Conn. 83 (1973); *State v. Crewe*, 193 Conn. App. 564, 575, *cert. denied,* 334 Conn. 901 (2019); *State v. Stephenson*, 181 Conn. App. 614, 635–36, *cert. denied*, 330 Conn. 908 (2018); *State v. Gjini*, 162 Conn. App. 117 (2015).

The proper focus "is on the relationship between the defendant and the contraband" "rather than on the relationship between the defendant" and the location where the drugs are found. *State v. Harper*, 167 Conn. App. 329, 343 (2016); *Nova*, 161 Conn. App. 719. "To mitigate the possibility that innocent persons might be prosecuted for ... possessory offenses ... it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." *State v. Fermaint*, 91 Conn. App. 650, 655 (2005); *State v. Sinclair,* 332 Conn. 204, 233–34 (2019); *State v. Johnson*, 316 Conn. 62.

State v. Nesmith, 220 Conn. 628 (1991), is illustrative of these principles. In *Nesmith,* the defendant had been charged with possession of narcotics in conjunction with his arrest in a vacant apartment known by police to harbor drug users. *Id.*, at 629-30. At the time of his arrest, from six to eleven people had occupied the front room of the abandoned apartment. *Id.*, at 630. Upon seeing the police enter, the defendant attempted to move toward an unoccupied room in the rear of the apartment. *Id.* An officer pursued the defendant into the empty room and witnessed him drop something to the floor. *Id.* After restraining the defendant and ordering him to return to the front room where other officers had detained the other occupants of the apartment, the officer investigated the back room further and found a number of envelopes and plastic vials containing narcotics on the floor. *Id.*

According to the defendant, he was waiting for a friend in the hallway outside the apartment when a police officer grabbed him and brought him inside the apartment. *Id.*, at 630-31. The defendant claimed that he was then directed to sit on the floor with approximately eleven other detainees. *Id.*, at 631. While sitting with the other detainees, the defendant explained, he had observed the man next to him drop the narcotics. *Id.*

In affirming the defendant's convictions, this Court acknowledged that two conflicting stories had been presented through the evidence, each of which identified a different individual as the person discarding the drugs. *Id.*, at 635-36. The jury, as fact finder, was entitled to believe the story that it found credible. This Court concluded, "there was no risk that the jury would infer the defendant's possession of the drugs from the mere fact that he was in nonexclusive possession of the premises because the evidence established that either the defendant or another detainee identified by the defendant discarded the drugs." *Id.*, at 636 n. 11. A nexus was shown through direct observation.

The connection or nexus between the defendant and the contraband can take many forms. Observation is a common form, as in *Nesmith*: the defendant was seen throwing or secreting an object in the precise location where the drugs are found, or is seen carrying a bag or container similar or identical to the bag or container in which the narcotics are later found. *State v. Goodrum*, 39 Conn. App. 526, 529–30, 533 (1995); *State v. Rodriguez*, 93 Conn. App. 739, 750 (2006), *cert. dismissed as improvidently granted,* 281 Conn. 817 (2007); *State v. Somerville*, 214 Conn. 378, 380 (1990); *State v. Nesmith*, 220 Conn. 634. No such observation was testified to in this case: the defendant was not seen with a container at any point, and was **never** seen on the second floor landing.

Admissions or statements by the defendant can also support an inference. *State v. Sinclair*, 332 Conn. 234. But in this case, while the police testified the defendant said he was sorry for running, allowing the inference he was on the porch at 126-28 Walnut Street, they did not testify that he said anything at all about the drugs.

Likewise, apparent drug transactions can support an inference; **provided** the observed activities are shown to be drug transactions, and provided the drug transactions are **directly connected** to the contraband. *State v. Sinclair*, 332 Conn. 234. Compare *State v. Slaughter*, 151 Conn. App. 340 (2014) with *State v. Nova*, supra. As *Nova* established, this requires more than a simple police opinion that he has witnessed a drug transaction. It requires evidence directly tying the transaction **to the contraband.** No such evidence was introduced in this case.

Another circumstance establishing a nexus is testimony that the defendant made a furtive movement toward, or manipulated the area where the drugs are located. *State v. Butler*, 296 Conn. 62, 78–79 (2010) (officers observed defendant make a furtive movement toward console where narcotics were later found). However, furtive movements, standing alone, cannot establish possession. See *Fermaint*, 91 Conn. App. 658 (furtive movements alone insufficient). Rather, as with drug transactions, movement **in relation to the contraband** must be shown. See *State v. Brunori,* 22 Conn. App. 436-7.

What these differing types of circumstances establish is the requirement that the state show the essence of dominion and control: **knowledge** of the contraband must be shown. **Knowledge** is a prerequisite to dominion and control. Throwing, discarding, or retrieving show knowledge; statements show knowledge; and furtive movements related to the contraband show knowledge. But all of these actions must be directly tied to the contraband, or they don't show anything at all.

As an alternative to showing a nexus, the state can offer evidence eliminating the possibility that any other possible possessors exercised dominion and control over the contraband. The state can do this either directly (by introducing evidence of denials of possession, as in *Goodrum*), or circumstantially.

A good example of such a circumstantial process of elimination case is *State v. Winfrey*, 302 Conn. 195, 210–13 (2011). In *Winfrey*, the defendant was driving a car in which drugs were found. In determining the drugs belonged to the defendant, this Court noted that the

car was registered to the defendant's wife and driven by the defendant, making it more likely that the defendant rather than his passenger was aware of and controlled its contents. Further, the jury reasonably could have found that the defendant had five wax folds of heroin on his person at the time of arrest, which he swallowed to escape criminal liability.

Everything else being equal, possession of these suspected drugs made it more likely that the defendant, rather than his wife or the passenger, was also the owner of the drugs in the vehicle. The defendant's physical possession of rolling papers and more than $550 in cash at the time of his arrest also rendered it more likely that the drugs in the car belonged to him. Finally, the defendant's medical records reveal that he was a daily user of cocaine and marijuana, as well as heroin, and, tellingly, a laboratory analysis established the presence of cocaine and opiates on the date of his arrest. By contrast, the record contained no evidence of drug use by the defendant's wife or Goodwin—the other two individuals who might reasonably have owned the contraband—nor does it disclose any other indication that they might have been the actual owners.

In this case, in contrast, the state did not attempt to eliminate the possibility that any other individual could have possessed the contraband. Significantly, the police failed to ask the residents if any of them owned the drugs found in the hallway. Indeed, the defense presented two of the residents as witnesses—and the state failed to ask either whether they owned or knew who owned the drugs found in the hallway. The state's failure either to connect a defendant to contraband found in an area not exclusively possessed by the defendant, or to eliminate the possibility of another possessor, mandates reversal. See *State v. Alfonso*, 195 Conn. 624, 634 (1985) (defendant and 2 roommates denied possession of marijuana found in common area; but no evidence concerning 4th roommate); *State v. Gainey*, 116 Conn. App. 710, 723 (2009).

The absence of a nexus between the defendant and the contraband rendered the evidence insufficient. This standard is well established in this Court's jurisprudence. One of

the earliest examples is *State v. Chisolm*, 165 Conn. 83, 85–86 (1973), a case with very similar facts to this case.

The defendant in *Chisolm* was seen walking toward the location of the drugs, a storage bin, but was never seen with narcotics or in the bin. He was convicted of possession of the drugs found in the bin. Holding the evidence insufficient, this Court stated, "[n]o one saw the defendant with narcotics; no one saw the defendant in the bin; no one saw the defendant place anything in the bin or remove anything from it. No tenant testified that his key would not unlock the padlock on the bin. No testimony was offered which would establish that the defendant's key was the only key that would unlock the padlock on the bin. Boiled down to its essentials, the only evidence of the defendant's culpability was that he had a key which unlocked a padlock to a bin in the cellar of a multiple dwelling which he owned but in which he did not live and the additional fact that narcotics were found in the bin." What was missing was a nexus: a connection between the defendant and the contraband.

In *State v. Nova,* 161 Conn. App. 708, likewise, the drugs were found in a common area of an apartment where the defendant did not reside (just like the drugs in this case). The Appellate Court determined that the evidence was insufficient to prove constructive possession. The state argued that the defendant's presence on the balcony and in the kitchen of the apartment where the drugs were found; his unfettered access to the apartment; and the circumstances surrounding his meeting with a pickup truck driver supported an inference of constructive possession. The state also argued that it was reasonable to infer that a drug deal occurred with a pickup truck driver seen meeting with the defendant in the parking lot, because (1) the defendant was seen in the apartment just before the meeting and (2) the driver appeared to be snorting cocaine afterward. *Id.* at 716–17.

However, the Appellate Court held this insufficient: there was no nexus connecting the defendant and the illegal drugs found in the apartment.

Likewise, in *State v. Billie*, 123 Conn. App. 699, the missing link between the defendant and the drugs mandated reversal. In *Billie*, the police received an anonymous tip that a black

male had secreted a stash under a porch. The police staked out the area, and arrested the defendant when he came and retrieved the bag. Recognizing that the defendant clearly knew the bag was secreted under the porch, the Court rejected the argument that he was therefore the only one who could have put it there, holding that "contraband found in a public area could have been secreted there by virtually anyone." The link between the evidence and the conclusion that the defendant possessed the drugs was tenuous; what was missing was a nexus. *State v. Billie,* 123 Conn. App. 699–700.

Recently, in several cases, the Appellate Court has sustained a conviction without a clear nexus. See, e.g., *State v. Bischoff*, 182 Conn. App. 563, *cert. denied*, 330 Conn. 912 (2018); *State v. Walcott*, 184 Conn. App. 863, 876 (2018); *State v. Slaughter*, 151 Conn. App. 340 (2014). The nexus was ambiguous in *Slaughter,* where the evidence established the defendant was one of two people with access to the apartment where the drugs were found.[6] It was far more ambiguous in *Bischoff*, where the defendant was one of six people in a motel room with access to the drugs, and almost absent in *Walcott*, where the Court relied upon the lower burden of proof in a violation of probation case.

No nexus at all was established here. The drugs were found in a common area of an apartment building in which the defendant did not live, to which multiple persons had access, and no evidence individually linking defendant and drugs was offered. Nor did the state introduce evidence eliminating any other possible owner: the evidence contains few details about the other residents of the building. Significantly, it does not even include a denial of ownership from those who did testify.

Where the evidence shows only that the defendant was near the contraband, and no direct connection between the defendant and the contraband, there is no nexus, and reversal is mandated. *State v. Nova*, supra; *State v. Billie*, supra; *State v. Alfonso*, 195 Conn. 624. This is such a case. The contraband was found in the common area of a multifamily house.

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[6] *Slaughter* bears some similarity to *Winfrey* in this regard, but the facts allowing the inference of constructive possession in *Slaughter* are much more ambiguous.

Several people lived in the house. While the officers testified to the defendant's presence in a different part of the building, no one testified they saw him near the common area where the drugs were found, let alone provided other, incriminating circumstances showing a relationship between the defendant and the contraband, knowledge, and dominion and control.

A comparison with *State v. Waden,* 84 Conn. App. 147, 153-54 (2004), is compelling. In *Waden*, as in this case, the police observed individuals approaching the defendant and conducting a hand-to-hand exchange. But in *Waden,* in addition to those observations, the police noted that in between transactions, the defendant would cross the street, and proceed to a parking lot and then return to 152-154 Brook Street a few minutes later.

However, unlike the Waterbury Police, the Hartford Police in *Waden* conducted additional investigation: they further observed the defendant, and saw him retrieve a bag from the ground next to the tree near that parking lot. They searched the ground near that tree, and found a plastic sandwich bag that contained small, knotted plastic bags of cocaine: the defendant's "stash." The Waterbury Police failed to take this second, vital step: they failed to connect the defendant to the "stashed" narcotics. See also *State v. Forde*, 52 Conn. App. 159 (1999) (defendant convicted based upon similar, back and forth activity; confederate's fingerprint found on the "stashed" narcotics).

In *Waden,* as in this case, the state presented expert testimony that it is common for a street level drug dealer to keep a "stash" of narcotics in an area close to where he is selling, rather than have a significant quantity on his person. 10/11/16T91-92. Similar behavior was alleged in *Forde* and *Billie*; manifestly, it is common for drug dealers.

But if it is common for drug dealers to leave their stash of narcotics in a nearby place, then a given stash of narcotics in an area known for drug trafficking cannot simply be attributed as belonging to any given defendant, even if he engages in suspicious behavior, without further evidence. Given the uncontroverted fact that the police have previously found large quantities of narcotics in the buildings on Walnut Street, it was incumbent upon the

state to produce a witness connecting this defendant, **particularly,** to this large quantity of narcotics, **particularly.** The state failed to do so.

The nexus requirement is not unique to Connecticut law. The federal courts and several states also apply this requirement, and will reverse a conviction unless it is supported by more than temporal or spatial proximity between the defendant and the contraband.

The "nexus" concept has been applied in some federal circuits in constructive possession cases for many, many years. In *United States v. Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965), the Second Circuit held that "to reach 'constructive' possession as well as actual possession, i.e., such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession. Cf. Holmes, The Common Law 216 (1881)."[7]

Consistently, in *United States v. Griffin*, 684 F.3d 691, 696 (7th Cir. 2012), the Seventh Circuit held that the nexus between the defendant, a convicted felon, and firearms found in his residence, which he shared with his parents, was insufficient to establish constructive possession. In so holding, the Seventh Circuit held that the government was required to demonstrate "not just a substantial connection between the defendant and the location, but also a substantial connection between the defendant and the contraband itself." *Id.* at 696–97. The Seventh Circuit noted that this was consistent with the standard in other circuits. *Id.* (citing cases from the Third, Fifth, Ninth, Tenth and D.C. Circuits); *United States v. Reece*, 86 F.3d 994, 996 (10th Cir. 1996); *United States v. Gutierrez-Moran*, 125 F.3d 863 (10th Cir. 1997).

> "This required 'nexus' must connect the defendant to the contraband," and may be established in one of two ways. *Id.* The government can show that Davis had either "exclusive control" over the property where the revolver was found, or a "substantial connection" to the location where the revolver was found. *Id.* at 695–96. In the case

[7] Holmes does not use the terms "constructive possession" or "nexus" in The Common Law. However, his chapter on Possession, to which the *Casalinuovo* Court cites, differentiates between possession and ownership, suggesting the delineation between constructive possession ("ownership") and actual possession ("possession").

> of a joint residence, the evidence should show a substantial connection between the defendant and both the property *and* the contraband. *Id.* at 696–97. "[M]ere proximity to contraband is not enough to establish a sufficient nexus." *Id.* at 696. "Rather, proximity coupled with evidence of some other factor—including connection with [an impermissible item], proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise is enough to sustain a guilty verdict."

United States v. Davis, 896 F.3d 784, 790 (7th Cir. 2018) (citing *Griffin*).

In this case, there was no connection between the defendant and the contraband—he was never seen near it, there was no physical evidence connecting him to it, and even if one speculates that what the police observed were drug transactions, these were not shown to involve it.

In another Seventh Circuit case, *United States v. Windom*, 19 F.3d 1190, 1200–01 (7th Cir. 1994), the Seventh Circuit elaborated on the need to make a direct connection between the defendant and the allegedly possessed contraband, and not merely a connection between the defendant and narcotics trafficking. While executing a search warrant at the home of the defendant's niece, the defendant was observed exiting a room: he had a derringer on his person, and $270.00 in cash, including a $20.00 bill used in a controlled buy. The police found a backpack with drugs in the room; the defendant was charged and convicted of their possession.

The Seventh Circuit held the evidence was insufficient, holding that although "the prosecution may rely on a piece of evidence that shows both the defendant's property interest and his right of access to the property and drugs, this does not obviate the requirement that there be some kind of evidence showing the defendant's authority with respect to the drugs." "There is simply no evidence that Windom had the requisite authority to determine the disposition of the drugs found in the backpack. Windom was present in a house where a backpack was discovered containing heroin and cocaine and, although he was never seen with drugs, he possessed a $20.00 bill from a controlled buy. However...the narcotics from the controlled buy were not linked in any way to the narcotics in the backpack. Therefore, the evidence is insufficient to support Windom's convictions on Counts Four and Five." *Id.*

"The possession of the marked bill might justify the inference that Windom controlled the drugs that were sold to the officers if the government put on evidence that Windom was entitled to the money as his share in the drug transaction." Moreover, "the government could then demonstrate Windom's authority over the drugs in the backpack if it could show that the drugs from the controlled buy came from the backpack." But there was no evidence to support those inferences, "and the government has not attempted to prove possession in this way. As this court has stated before, Robert Frost's "The Road Not Taken" delivers the proper message for appellate review of criminal cases." *Id.*

Confronting a similar situation, in which there was evidence of trafficking, but not sufficient evidence of possession, in *United States v. Dunlap,* 28 F.3d 823 (8th Cir. 1994), the Court of Appeals for the Eighth Circuit found proximity to drugs insufficient to support a finding of possession, even under suspicious circumstances. Acting on a tip that drugs were being sold from defendant-appellant Dunlap's apartment, the police secured a warrant. As they approached his door, Dunlap opened the door from the inside. Standing behind Dunlap was defendant-appellant Cornelius Coleman, who had a handgun in his pocket. In the kitchen, the officers found large amounts of cocaine powder, and some of the powder was in the process of being cooked. Coleman's hat was also in the kitchen, and more drugs and drug distribution paraphernalia were found in the apartment. Both defendants were convicted of possession with intent to distribute cocaine.

The Eighth Circuit held that Coleman's mere presence in the apartment, including the evidence that he may have been in the kitchen, did not prove that he possessed the cocaine. He may have been visiting Dunlap to purchase cocaine for his own use, an offense not charged, and it was speculative for the jury to conclude beyond a reasonable doubt that he possessed the drugs. See also *United States v. Disla,* 805 F.2d 1340, 1352 (9th Cir. 1986) (numerous calls provided circumstantial evidence connecting defendant to the ongoing conspiracy, but not sufficient to support a conviction for constructive possession of cocaine seized at airport in the suitcase of co-conspirators).

Like the federal circuit courts, other states have held that in constructive possession cases, the government must introduce evidence of a nexus between the defendant and the illegal contraband. See, e.g., *State v. Schelin*, 55 P.3d 632, 636 (Wash. 2002); *State v. Garza,* 735 P.2d 1089, 1095 (Idaho Ct. App. 1987); *Lee v. State,* 835 So. 2d 1177, 1179 (Fla. Dist. Ct. App. 2002); *People v. Bryant*, 2008 WL 3979519 (Ct. App. Mich. 2008).[8]

In *State v. Lucero,* 350 P.3d 237, 240–41 (Utah Ct. App. 2015), the Utah Court of Appeals reversed a defendant's conviction based upon an insufficient nexus between the defendant and the contraband. In *Lucero*, the police stopped a car driven by the defendant and containing a female passenger. The defendant was not the registered owner of the car, and had no driver's license. The police impounded the car, and conducted an inventory search. When they came to a sling backpack, the defendant exclaimed it was not his. The police found drugs in the backpack.

The Utah Court of Appeals held that the state had not established a sufficient nexus between the defendant and the contraband. Rather, "[a] defendant's joint occupancy of the premises where the [contraband] is discovered must be combined *with other evidence* sufficient to establish the defendant's knowing and intentional control over [the contraband]." *Id.* at 240-41 (cites and quotes omitted). If "the only connection between a defendant and the contraband is bare title or mere occupancy of the area in which it is found, there may be substantial room for reasonable doubt as to whether the contraband belongs to the defendant. Such doubt may be especially substantial where other people with access to the area could have placed the contraband in the home or vehicle without the owner's knowledge, and thus the owner would have no power and intent to exercise dominion and control over it." *Id.* In so holding, the Court of Appeals distinguished an earlier Utah case, in

[8] M. Judge and S. McCulloch, Criminal Law and Procedure, 44 U. Rich. L. Rev. 339, 372 (2009), discuss and compare two Virginia cases involving constructive possession by defendants in nonexclusive possession of apartments.

which a knife carried by the defendant "was caked in a tar-like substance that matched the substance found inside the bag."

Lucero's denial of ownership is strongly analogous to one of the state's principle circumstances for asserting constructive possession in this case: the defendant's flight upon the approach of the police. In this case, as in *Lucero*, the state argued consciousness of guilt. But Lucero's denial, an inadequate basis for constructive possession, was actually more probative than the defendant's flight: it represented a direct attempt to disclaim the package containing the drugs.

In this case, the police testified that the anonymous tip providing them the defendant's location also included the information that the defendant had outstanding warrants. In consequence, his flight upon seeing police officers cannot be attributed to constructive possession of the drugs. It is equally plausible to say he fled based upon the outstanding warrants. Like Lucero, there was nothing on the defendant's person that connected him to the contraband; the defendant should have been acquitted.[9]

C. The Evidence was Insufficient to Sustain the Defendant's Convictions.

Even viewing the evidence in the light most favorable to the state, the evidence was insufficient to establish possession. The defendant's convictions depend on whether the state presented sufficient evidence to prove that the defendant possessed the brown paper bag found in the stairwell, which contained the narcotics. The state did not present sufficient evidence to sustain these convictions, and therefore, the convictions must be vacated.

Because the defendant was not found in actual possession of the narcotics and paraphernalia, the state proceeded on the theory of constructive possession. Constructive possession requires proof of a nexus: a direct connection between the defendant and the drugs that established that the defendant was aware of the narcotics' presence and exercised

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[9] Compare *State v. Forde,* supra (fingerprint of confederate on the bag); *State v. Diaz*, 109 Conn. App. 519, 527 (2008). In *Diaz*, the state offered evidence that uniquely stamped packages of narcotics were found in the defendant's residence and on his person to establish possession of the narcotics in his residence.

dominion and control over the narcotics. The state was required to offer evidence to show the defendant had an appreciable ability to guide the destiny of the drugs.

No evidence of that ability was introduced at trial at all. There was no showing that the defendant ever touched or even knew about the drugs found in the second floor landing at 126-28 Walnut Street.

The state, and the Appellate Court, relied upon the two hand-to-hand exchanges testified to by an observing officer. But it is speculation to conclude that the two hand-to-hand transactions testified to by the police were drug transactions. The officer observing the transactions was 150-175 feet away, and could not say what, if anything, was exchanged.

Moreover, it is complete speculation to tie those transactions to the drugs found on the landing. The police made no attempt to stop the individuals who allegedly exchanged items with the defendant, to establish what it was they had received or given to the defendant, if anything. The observations establish no nexus between the defendant and the illegal drugs found on the landing at 126-28 Walnut Street at all.

The narcotics were in a common area, accessible to all of the building's residents, or anyone else entering the building through the open door. There were other people in the building—residents, with equal or better access to the area where the contraband was found. While the police testified they talked to all of them, 10/11/16T65-72, the police did not testify that they asked any of them who owned the drugs on the landing. In consequence, it cannot be inferred the defendant knew of the narcotics and exercised dominion and control over them; this is unwarranted speculation.

Further, Sergeant Angon, an expert in narcotics transactions, testified that Walnut Street is a high crime, high drug trafficking area. Sergeant Angon and other police officers testified that they had encountered large quantities of narcotics in the buildings on Walnut Street "dozens" of times. 10/11/16T22-3, 94-96, 102-03.

If it is common to find large quantities of narcotics in buildings in the Walnut Street area, as Sergeant Angon and the other police witnesses testified, and it is common to observe

drug trafficking in the area, then it is not reasonable to connect the defendant to a particular quantity of narcotics found in that area based solely on a temporal and spatial nexus. "Although the defendant's presence on the staircase, at some point, may reasonably be inferred, his presence on the staircase alone would be insufficient to establish beyond a reasonable doubt his constructive possession of the drugs that were found there." *People v. Cooper,* 584 N.Y.S.2d 489, 491 (App. Div. 2 Dept. 1992). The inference that the defendant owned the drugs was unreasonable. The drugs could have belonged to a resident; they could have belonged to another dealer. The defendant was never seen near the drugs, only the stairway leading ultimately to the landing where the drugs were located.

In those cases in which observed, alleged drug sales have formed a basis for sustaining a defendant's convictions, additional circumstantial evidence establishing a direct connection to contraband has been introduced. Usually, this involves a view of either contraband or of currency. Compare *State v. Slaughter*, 151 Conn. App. 340, 348 (2014) (defendant observed entering apartment, for which he had keys; other evidence defendant lived in apartment; money layered in drug dealer fashion; defendant seen going to the apartment, receiving money for objects in alleged drug transactions) with *State v. Nova*, supra (defendant merely seen in parts of apartment, which he frequented but did not apparently live in; no evidence defendant made suspicious movements toward narcotics, no evidence received money for item, and single brief exchange not established as drug sale, as neither money nor item identified). On occasion, as noted above, it involves a connection between drugs found on the defendant's person, and drugs found in identical packaging in the apartment. However, none of these facts and circumstances were present in this case.

The fact that neither money nor contraband were identified as part of the transaction in this case establishes that they may only be labeled drug transactions by speculation. Compare *State v. Forde*, 52 Conn. App. 159 (1999). In *Forde*, officers observed money being exchanged in a hand-to-hand transaction between the defendant and a truck driver, and that money was later found in the possession of the defendant. *Forde*, 52 Conn. App. at 165.

After receiving the money, the defendant's accomplice went to a stone wall to retrieve an unidentified item and gave it to the driver. *Id.* A paper bag containing narcotics, with the defendant's accomplice's fingerprints on it, was subsequently discovered from that wall. *Id.* Based on those circumstances, the court determined that the jury could have reasonably inferred that the defendant had control over the drugs, because it could be inferred that a drug sale took place. *Id.*

Because the officers in *Forde* saw money being exchanged, that made it more likely that a narcotics sale was taking place, which allowed the jury to make such an inference. In the present case, however, Officer Phelan did not know what, if anything, was exchanged by the defendant and the unnamed "buyers," as he observed them through binoculars from 150 feet away. That inference cannot be made: unlike *Forde*, no items were identified or recovered. Further, the defendant was not charged with any crime for those "sales." Cf. *State v. Nova*, 161 Conn. App. 155 n. 8 (noting as significant that defendant not charged for alleged "sale").

Lastly, fingerprint evidence was collected from the paper bag in *Forde*, which matched the fingerprints of the defendant's accomplice. *Forde*, 52 Conn. App. 167. Similar identification of the container in which the drugs were found has been found significant in *State v. Goodrum,* 39 Conn. App. 526 (1995), and other cases. In this case, however, no physical evidence or identification of the container recovered was introduced to connect the defendant to the bag of narcotics found in the stairwell.

In *State v. Chisholm,* 165 Conn. 83 (1973), *State v. Alfonso*, 195 Conn. 624 (1985), and *State v. Nova*, 161 Conn. App. 708 (2015), the evidence was insufficient to establish constructive possession; there was no nexus between the defendant and the contraband. These cases mandated reversal. In this case, likewise, there was no nexus. Yet the Appellate Court affirmed the defendant's convictions in this case.

Many poorer citizens have no choice concerning the neighborhoods they live in. Decisions such as *State v. Bischoff*, 182 Conn. App. 563, *cert. denied,* 330 Conn. 912 (2018), *State v. Walcott*, 184 Conn. App. 863 (2018), and this case put these unfortunates at great

risk of arrest and conviction simply for being in the proximity of a drug dealer's stash of narcotics, whether they knew about it or not. It is grossly unjust to connect the defendant to a particular quantity of narcotics found in that area based solely on temporal and spatial proximity. "To mitigate the possibility that innocent persons might be prosecuted for ... possessory offenses ... it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." *State v. Billie*, 123 Conn. App. 690, 699 (2010).

This requirement has deep roots in Connecticut law. In *State v. Chisolm*, 165 Conn. 85–86, the defendant, the building owner, was seen walking toward the location of the drugs, a storage bin, but was never seen with narcotics or in the bin. All the state offered was spatial and temporal proximity: this was insufficient. But it was more than the state offered in this case.

Similarly, in *State v. Alfonso,* this Court held that the evidence of possession of marijuana was insufficient. There was no other circumstantial evidence from which the jury could reasonably infer that the defendant was aware of the presence of the marijuana in the apartment. The marijuana was discovered in a common area, it was not among any of the defendant's personal possessions, and there was no evidence that the defendant had used marijuana in the past. *State v. Alfonso*, 195 Conn. 634. There were no facts and circumstances establishing a nexus.

In contrast, in *State v. Somerville*, 214 Conn. 378, 391 (1990), there **were** facts and circumstances establishing such a nexus. While there was testimony the defendant engaged in drug transactions, as here, there was also testimony describing the contraband as being in distinctive vials with blue caps in the defendant's actual possession. There was also testimony that the defendant threw the same plastic bag filled with small vials with the distinctive blue caps near the rear stairs of the neighboring house, where the police subsequently found the crack vials at issue. Finally, there was testimony that the defendant was seen bending down somewhere near the garbage can under which the illegal drugs

were found. Cf. *State v. Nesmith*, 220 Conn. 618, 630 (1991). But no such evidence was offered in this case.

Unlike *State v. Berger*, 249 Conn. 218, 225-6 (1999), the defendant made no statements acknowledging ownership, dominion and control of the contraband. Unlike *State v. Bruno*, 293 Conn. 127, 137 (2009), the state presented no evidence showing that the defendant possessed the key to the location where the drugs were found, or evidence that the defendant personally handled the narcotics. Unlike *State v. Butler*, 296 Conn. 62, 79 (2010), there was no evidence that the defendant manipulated the container where the drugs were located. And unlike *State v. Winfrey*, 302 Conn. 195 (2011), the state did not introduce evidence making the inference that the defendant possessed the drugs found significantly more probable than any other possible possessor: the state made no attempt to address other possible possessors at all.

State v. Sinclair, 332 Conn. 204, 234 (2019), presents a compelling contrast, and an excellent articulation of the kind of circumstantial evidence necessary to support a nexus between the defendant and the contraband found hidden in his car. In *Sinclair*, the defendant admitted to selling the narcotics; he provided $4000 to help a co-conspirator make bail; he was in the company of a known Waterbury heroin dealer just before a large quantity of heroin, packaged for sale, was discovered in the car in which he was a passenger. Finally, he appeared more nervous than an average person during the motor vehicle stop of this case. In this case, there was no evidence the defendant has a large sum of money and he never admitted selling narcotics.

Rather, in this case, as in *State v. Nova*, "there was no compelling correlation between the defendant simply being in the apartment where drugs and paraphernalia later were discovered and the conclusion that he constructively possessed those narcotics and paraphernalia." *State v. Nova,* 161 Conn. App. 722–23. In *Nova*, the Court rejected the state's proposed inference of constructive possession, which was based on the defendant's presence on the apartment's balcony and in the kitchen of the apartment, where the drugs

were found; his unfettered access to the apartment; and the circumstances surrounding his meeting with a pickup truck driver, from which it was reasonable to infer that a drug deal occurred. *Id.* at 716–17. The Appellate Court held that these factors "established nothing more than a temporal and spatial nexus between him and the cocaine and packaging materials found in those areas. The evidence established merely that he briefly appeared in those areas." *Id.* at 721. The nexus was lacking. Here, likewise, the nexus is lacking.

The Appellate Court tried to distinguish *Nova*, based on the lack of evidence of a hand-to-hand transaction in *Nova*. But in *Nova*, the police did observe what they thought was a narcotics transaction, during which the defendant went to the general area of the contraband. In *Nova* the purported buyer was seen snorting cocaine shortly after the purported sale.

Yet the Appellate Court held this insufficient to show the defendant exercised dominion and control: there was no nexus between the defendant and the drugs found in the apartment. In this case, the police saw what they thought were narcotics transactions, during which the defendant entered the stairway which led to the general area of the contraband. This was insufficient to show that the defendant had a nexus with the drugs found on the second floor landing: yet the Appellate Court held the evidence sufficient to establish constructive possession. There is no meaningful distinction: *Nova* conflicts with this case.

Likewise, in *State v. Billie*, the missing nexus between the defendant and the drugs also mandated reversal. In *Billie*, as noted above, the police staked out a stash of contraband and arrested the defendant when he came and retrieved the bag. The Appellate Court found the evidence of constructive possession insufficient, holding that "contraband found in a public area could have been secreted there by virtually anyone." Without additional evidence, any conclusion that the defendant previously had exercised dominion and control of the drugs would be based on speculation or conjecture. *State v. Billie,* 123 Conn. App. 699–700. In this case, likewise, since the door to the stairway was open, the contraband could have been secreted in the landing by virtually anyone. There is no meaningful distinction: *Billie* conflicts with this case.

The Appellate Court held that the particular location in which the drugs were found and the absence of other individuals observed on the porch allowed the inference of constructive possession. But the drugs were not found on the porch: they were found on a landing, to which several other people had access. Moreover, several of those people were in their apartments at the time the police found the narcotics. While the police testified they talked to each of those individuals, they did not testify that those individuals denied ownership. This is not *Winfrey*, in which the state introduced evidence establishing that another possible possessor was unlikely to be the owner. This is *Alfonso*, in which the evidence was insufficient based upon the state's failure to rule out another possible possessor.

Beyond the lack of circumstances that connect the defendant to the narcotics and paraphernalia found in 126–128 Walnut Street, the court should also take into consideration the state's lack of evidence concerning the building's other occupants. "[T]o convict the defendant of this crime, the state had to prove that the defendant, *and not some other person*, possessed a substance that was of a narcotic character. . . ." *State v. Gooden*, 89 Conn. App. 307, 316 (2005) (emphasis added). The state did not do that in this case. As in *Chisholm*, *Alfonso*, *Nova*, and *Billie*, there **were** other individuals with unfettered access to the location where the drugs were found. This eradicated any possibility of drawing an inference of constructive possession from the defendant's presence on the porch.

Unlike *Winfrey* or *Goodrum*, the state did not rule the residents, or other drug dealers, out as possible possessors. Indeed, two of the residents testified, and the state didn't even ask them about the drugs. In *Chisholm* and *Alfonso*, the failure to rule out other possible possessors meant that the nexus was not established, and constructive possession could not be inferred. Yet in this case, constructive possession was inferred. There is no meaningful distinction: *Chisholm* and *Alfonso* conflict with this case.

Finally, the Appellate Court relied upon consciousness of guilt—the defendant's flight from the police--to infer constructive possession. Such an inference is particularly unjustified in the present case because, at the time of his flight, there were several unrelated warrants

out for his arrest, suggesting a reason to flee the police that had nothing at all to do with any alleged drug possession. The Appellate Court responded to this point by suggesting, "it is better logic to infer that the defendant, who is charged with several offenses, fled because of a conscious knowledge that he is guilty of them all." 191 Conn. App. 513 (cites omitted).

The probative value of consciousness of guilt evidence depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight (2) from the defendant's behavior in fleeing to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. In this case, several of these inferences simply cannot be drawn. The defendant had an independent reason to flee the scene that had nothing to do with the contraband.

> There are a number of legitimate reasons why a law-abiding citizen may not desire to remain on the scene when the police appear, especially in a dangerous neighborhood where police-citizen relations may be strained...."Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.... [T]he evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient."

State v. Edmonds, 323 Conn. 34, 73–74 (2016) (cites and quotes omitted). While *Edmonds* does not eliminate consciousness of guilt as an inference, it clearly establishes that the state must do more than simply say "he ran, therefore he did it." "Evidence thought to bear on consciousness of guilt has traditionally been considered weak because an innocent person may attempt to extricate himself from a situation by denying incriminating evidence even though he knows it can be truthfully explained or by fleeing from an accuser because of fear of wrongful conviction. Thus, a false alibi may be due not to consciousness of guilt of the crime charged but to consciousness of some incriminating evidence and the justifiable desire to remain free." *People v. Moses*, 63 N.Y.2d 299, 308 (N.Y. 1984). The defendant's flight

could be attributed to panic, to the warrants, to fear of harassment—it cannot be tied to the contraband without speculation.

The narcotics and scale in this case were discovered on the second floor landing of a stairwell, a common area, inside a multi-family home where the defendant did not live. The evidence does not establish that the defendant was ever on that landing on August 14, 2015. Because the defendant was not in exclusive possession of the premises where the narcotics were found, 126-128 Walnut Street, the state's theory of constructive possession fails. It is pure speculation for a court to conclude, because of a defendant's mere proximity to the narcotics and his passage through the area in which the drugs were found, that the defendant controlled the narcotics. *Nova*, 161 Conn. App. 723. A defendant's presence in the common area of a home, through which anyone entering the apartment must pass, fails to support an inference that a defendant exercised dominion and control over narcotics found in that common area. *Id.*; *State v. Alfonso*, 195 Conn. 624; *State v. Billie*, supra.

The out-of-state authorities provide further support for the conclusion that the absence of a nexus meant the state's evidence was insufficient to establish a nexus between the defendant and the contraband. The most compelling out-of-state authority is *United States v. Windom*, 19 F.3d 1190 (7th Cir. 1994). In *Windom*, the defendant's possession of a $20.00 bill from a controlled buy allowed the inference of his participation in a narcotics transaction. But without evidence tying that transaction to the narcotics found in the apartment, the Seventh Circuit held that a conclusion of constructive possession was unwarranted. See also *United States v. Dunlap*, 28 F.3d 823 (8th Cir. 1994) (suspicious circumstances surrounding Coleman's presence in the apartment and his carrying a gun could not allow the jury to find beyond a reasonable doubt that he possessed the cocaine found there).

There was no additional circumstantial evidence in which the jury could have made an inference that the defendant possessed the narcotics, and, therefore, had a nexus with the narcotics. He was not seen carrying the paper bag containing the drugs, and was not shown to have keys to the building. Cf. *Goodrum*, 39 Conn. App. 533-34; Cf. *State v. Slaughter*, 151

Conn. App. 340 (2015) (defendant had keys to the apartment); *State v. Rodriguez*, 93 Conn. App. 739, 750 (2006), *cert. dismissed as improvidently granted,* 281 Conn. 817 (2007).

Nor is it reasonable to infer the defendant knew of the drugs' presence; the absence of photographs of the exact location establish the possibility that even if he was on at 126-28 Walnut Street on August 14, 2015, that he never saw them. It is unknown who else could have been in the stairwell before the officers ran into the house. This case is like *Nova*, *Billie*, or *Alfonso*: the defendant was convicted of possession of contraband based upon evidence which, even in the light most favorable, established only that he was in the general vicinity of it, without any showing of knowledge, dominion or control. *See State v. Alfonso*, 195 Conn. 634–35. Reversal is mandated.

D. The Defendant's Conviction Must Be Reversed and an Acquittal Directed.

There are cases in which the facts, taken as true, do not establish all of the elements of the crime charged. In such a case, the Supreme Court is required to direct a judgment of acquittal, because the evidence adduced was not sufficient to establish guilt beyond a reasonable doubt. *State v. Sivri*, 231 Conn. 115, 136 (1994). This is such a case. Even in the light most favorable to sustaining the verdict, the evidence is insufficient. It is well established that a fact finder "may not resort to speculation and conjecture." *State v. Little*, 194 Conn. 665, 673 (1984); *State v. Billie*, 123 Conn. App. 690, 700–02 (2010). Because the state's case and the court's verdict were predicated on impermissible speculation, the defendant's unconstitutional convictions must be reversed.

CONCLUSION

The defendant respectfully requests that this Court reverse the Appellate Court's decision, and remand the case to the Superior Court with direction to vacate the defendant's convictions for possession of narcotics with intent to sell, sale of narcotics within 1500 Feet of a school zone, possession of drug paraphernalia, and illegal possession of narcotics. For the lack of sufficiency for the element of possession, the defendant's convictions should be reversed and his convictions vacated.

THE DEFENDANT
JAVIER VALENTIN PORFIL

BY: _____

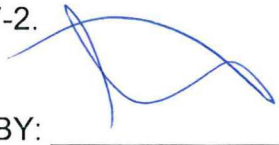
JAMES B. STREETO
SR. ASSISTANT PUBLIC DEFENDER
OFFICE OF THE CHIEF PUBLIC DEFENDER
55 WEST MAIN ST., SUITE 430
WATERBURY, CT 06702
(203) 574-0029/FAX (203) 574-0038
JURIS NO. 307285
James.Streeto@jud.ct.gov

S.C. 20379	:	STATE OF CONNECTICUT
STATE OF CONNECTICUT	:	APPELLATE COURT
VS.	:	
JAVIER VALENTIN PORFIL	:	JANUARY 3, 2020

CERTIFICATION

Pursuant to Conn. Prac. Bk. §§ 62-7 and 67-2 the undersigned certifies that the attached brief and appendix on certification is a true copy of the electronically submitted brief and appendix on certification, and that a true copy was sent electronically and mailed first class postage prepaid this 3rd day of January 2020, to: Laurie N. Feldman, Juris No. 434331, Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, laurie.feldman@ct.gov, and was sent by mail to the defendant, Javier Valentin Porfil #300447, Robinson Correctional Institution, 287 Bilton Road, P.O. Box 665, Somers, CT 06071. It also is certified that the brief and appendix on certification comply with all the provisions of Conn. Prac. Bk. § 67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief and appendix on certification do not contain any name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk. § 67-2.



BY: _____

JAMES B. STREETO
SENIOR ASSISTANT PUBLIC DEFENDER
JURIS NO. 307285
OFFICE OF THE CHIEF PUBLIC DEFENDER
55 W. MAIN STREET, SUITE 430
WATERBURY, CT 06702
TEL. (203) 574-0029
FAX (203) 574-0038
James.Streeto@jud.ct.gov